(2)

No. 91-465

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In The

Supreme Court of the United States

October Term, 1991

ACADEMY LIFE INSURANCE COMPANY,

Petitioner,

v.

GEORGE W. GUILL,

Respondent.

ACADEMY LIFE INSURANCE COMPANY,

Petitioner,

v.

NORRIS O. WHITLEY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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(5)

RESTATED QUESTIONS PRESENTED

I. Whether the conclusion of the Court of Appeals that this Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991) foreclosed Petitioner's due process claim warrants review by this Court.

II. Whether Petitioner's due process claim should be reviewed by this Court in spite of Petitioner's failure to raise the claim timely in the District Court.

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STATEMENT OF THE CASE

Respondents are veterans of the Armed Forces of the United States, having served over 30 and 20 years respectively. Upon their retirements, they became agents of Petitioner, a life insurance company that aims almost exclusively at the military market. Notwithstanding considerable success as salesmen, both men had their contracts terminated in the summer of 1986. By that time, both had three different levels of contract with Petitioner, those being Agent, General Agent and Managing General Agent. Each category entailed different responsibilities and earned Respondents varying degrees of commission, the bulk of their income being derived from "override commissions" on policies sold by salesmen assigned to them. Under their contracts, Respondents had become "vested", meaning their entitlements to commissions survived as long as the policies sold remained in place and premiums were paid, regardless of whether Respondents continued as agents.

Throughout their tenure with Petitioner, Respondents received, as did all of Petitioner's salesmen, monthly reports detailing the status of every policy in existence in which they had any kind of a commission interest. These reports also reflected the status of Respondents' individual "escrow" accounts, established by Petitioner as collateral for the repayment to the company of any agents' debt for which Respondents might be liable under their contracts. The source of funds for these accounts were the commissions earned by Respondents, funds which otherwise were immediately due and payable to them. Petitioner also added interest monthly to these accounts.

The record is uncontested that the only two reasons these accounts could be reduced was either satisfaction of debt owed by Respondents to Petitioner or through disbursements to Respondents. The record is likewise uncontested that these accounts were reduced in spite of the fact that no debt existed and no payments were received by Respondents.

Shortly after being terminated, Respondents' commission checks were drastically reduced. Further, Petitioner ceased forwarding the voluminous and detailed statements that had accompanied the monthly checks previously. Thus, although Respondents knew they were not receiving the full amounts due them, they were unable to determine exactly what was due.

Following receipt of Petitioner's documents prior to trial, it was determined that certain but not all agents assigned to Respondents had been removed from their statements. It thus became apparent how the reduction in Respondents' commissions had been accomplished. By removing certain salesmen from Respondents' accounts, Petitioner had ceased crediting Respondents with the override commissions due on policies sold by those agents. Petitioner maintained at trial that these missing agents, and the substantial numbers of policies and commissions generated by them, had been relegated to Respondents' "escrow" accounts which was the reason they did not appear on Respondents' statements. Alternatively, and contradictorily, Petitioner also claimed that names ceased to appear because those agents had been reassigned to other Managing General Agents. Petitioner's only witness admitted, however, that agents who

were either still working for Petitioner or had left Petitioner in a "vested" status should continue to appear on Respondents' statements even after Respondents' terminations. He acknowledged that this was due to the continuing override interest Respondents had in the policies sold by those agents since both Respondents were vested. Notwithstanding this admission, Petitioner's only witness could offer no logical explanation for why the names of some agents who were still contracted with Petitioner and had worked for Respondents ceased to appear on Respondents' statements. He acknowledged that if agents, and therefore the overrides on all the policies they had written, had been taken from Respondents, that Respondents' damages would be greater than Petitioner was admitting.

Suit was filed in September 1987, Petitioner's Answer being served, following removal, approximately one month later. Petitioner's Answer did not raise any challenge to the punitive damages claim other than to contest the underlying factual allegations. Specifically, no due process challenge was made at any time all the way through the trial of the case in June of 1989. No mention of a constitutional challenge on any ground was made at the directed verdict stage of the trial, nor in Petitioner's post-trial motions. The first time Petitioner raised the issue of due process relative to the punitive damage award was in Reply to Plaintiffs' Opposition to Post-Trial Motions. Although included in Petitioner's brief to the Fourth Circuit Court of Appeals, the due process challenge was not raised at oral argument, Petitioners' counsel choosing instead to attack the submission of the conversion cause of action to the jury.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

The Court of Appeals neither misinterpreted nor misapplied this Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991) in reviewing this case. In spite of Petitioner's failure to raise the issue timely in the District Court, and its election to forego argument on the point in the Fourth Circuit, the Court of Appeals stayed its opinion in this case pending this Court's resolution of *Haslip*. Subsequent to this Court's decision in *Haslip*, the Court of Appeals concluded that *Haslip* "foreclosed Academy's due process claim". A review of the factors relied on by this Court in *Haslip* plainly reveals the soundness of the Fourth Circuit's conclusion. As correctly set forth in the Petition, those factors are as follows:

> *" . . . (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred."*

This is a case in which Petitioner was accused of nothing less than deliberately stealing Respondents' money. At trial, Respondents proved that Academy, for its own benefit and/or the benefit of others still in its employ, deliberately reduced payment of commissions owed to Respondents. This was accomplished through the removal of agents previously assigned to Respondents from Respondents' accounts, thereby transferring either to Academy itself or to other, more favored Managing General Agents, the commissions on policies which those agents had written and from which Respondents derived "override" commissions. Further, there was

uncontested evidence that Respondents' "escrow" accounts had been reduced, the records reflecting in some instances payments to an officer of Academy from at least one of those accounts. The only legitimate reasons for reductions in escrow accounts were satisfaction of agent debt or payment to Respondents. Petitioner admitted that no debt was owed by Respondents and offered no proof to contradict Respondents' sworn testimony that no payments from their escrow accounts were received by them. Respondents also proved that Petitioner attempted to conceal its theft of Respondents' money by withholding and, in some cases altering, the documentation detailing the status of policies and commissions. While these charges were contested by Academy, the jury found in favor of Respondents, which findings have been sustained by both the District Court and the Court of Appeals. Under these facts, there is clearly a reasonable relationship between the punitive damages award and the harm resulting from defendant's conduct.

> *" . . . (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct."*

Respondents submit that the degree of reprehensibility of Petitioner's conduct in this case is self-evident. The theft continued over a period of years and was deliberate, as was Petitioner's attempt at concealment. Further, Respondents presented evidence through the testimony of another former salesman that Petitioner was engaged in similar conduct with him.

> *" . . . (c) the profitability to the defendant of the wrongful conduct and the desirability of removing*

that profit and of having the defendant also sustain a loss."

The actual damage proven was approximately $75,000.00. That a jury chose to punish this company for its attempt to defraud its former salesmen of such a significant sum of money is hardly surprising and, indeed, desirable.

" . . . (d) the 'financial position' of the defendant."

Academy's own evidence revealed it was a company holding over 400,000 policies, operating through 1,000 agents from Guam to Germany. Further, the evidence demonstrated it had absorbed a payback to policy holders of approximately 55 million dollars which it had argued to the District Court caused no financial hardship.

" . . . (e) all the costs of litigation."

Obviously the Respondents were forced to retain the services of two attorneys and prosecute this case to verdict with all the costs normally attendant to such an effort.

" . . . (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation."

No criminal sanctions have been imposed upon Petitioner for its conduct in this case.

" . . . (g) the existence of other civil awards against the defendant of the same conduct, these also to be taken in mitigation."

No other civil awards have been obtained against Petitioner for its conduct in this case.

Respondents respectfully submit, under the facts of this case, that it is obvious why the Court of Appeals concluded that *Haslip* foreclosed Petitioner's due process claim and why that issue merited no more discussion than the review of the facts as presented in the Court of Appeals unpublished opinion.

II.

In its Petition for Writ of Certiorari, Academy suggests that consideration by the jury of the character and degree of its wrongful conduct toward Respondents was not mandated by the Court's instructions. This is simply not the case as a review of the Court's charge demonstrates. After being instructed carefully and correctly concerning the substantive law of conversion, the Court turned to the issue of damages. The Court first instructed the jury concerning actual damages on the breach of contract claim. Then, with regard to damages for conversion, the Court said:

> Now, if you find for the Plaintiffs on their conversion cause of action, and if you find that the Defendant converted the property innocently, that is, by mistake or under a bona fide belief or right, the measure of damages is the value of the property or amount of money converted, with interest, thereon from the date of conversion to the date of trial.
>
> And the Plaintiffs are entitled to no more than that amount.
>
> Please remember, however, my instruction that you may not award actual damages more than once for the same loss.

> The Plaintiffs are also seeking punitive damages in their conversion cause of action.
>
> The law permits the jury, under certain circumstances, to award punitive damages in order to punish a wrong-doer for some extraordinary misconduct, and to serve as a warning not to engage in such conduct in the future.
>
> Thus, if you find that the Plaintiffs have shown by a preponderance of the evidence, that the defendant converted the Plaintiffs' money with malice, ill will, a conscious indifference to the rights of others, or a reckless disregard for the rights of others, you may award the Plaintiffs punitive damages.
>
> If you so find, it becomes your right to award punitive damages in such an amount as you unanimously agree to be proper *in light of* the character of the wrong committed, the punishment which should be applied, and the ability of the Defendant to pay. (Emphasis supplied.)

Therefore, as in *Haslip*, these instructions " . . . thus enlightened the jury as to the punitive damages' nature and purpose, indentified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Pacific Mutual Life Ins. Co v. Haslip*, 111 S.Ct. at 1044. The very sentence which told the jury it could award punitive damages limited the jury's discretion in that regard to a consideration of the factors relied on by this Court in *Haslip*. Thus, if the Court is disposed to answer Petitioner's first question presented in the affirmative, this case hardly

presents a good vehicle for doing so as Petitioner had the benefit of that which it seeks. The instruction was mandatory with regard to the consideration of the character of the wrong and the punishment that should be applied to it. Merely the absence of the word "must" in the grammatical structure of the instruction does not render it otherwise. The jury having been limited in its consideration of punitive damages to one made "in light of" the factors relied on in *Haslip*, there is no need to reaffirm that position through the grant of a Writ in this case.

III.

Petitioner failed to preserve any objection on constitutional grounds to the punitive damage award in this case. Petitioner did not raise the issue in its Answer or any amendments thereto. Nor was the issue raised at directed verdict stage. Likewise, Petitioner raised no objection to the charge regarding punitive damages. Not even in Petitioner's Motion for JNOV (or in the alternative, for new trial) did Petitioner seek relief on any constitutional ground. The claim that the relief sought violated the Constitution of the United States is an affirmative defense. As such, the failure to have pleaded it in the Answer operates as a waiver. Fed.R.Civ.P. 8(c), *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 920 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967), *Marx & Co., Inc. v. The Diners Club*, 550 F.2d 505, 512 (2nd Cir. 1977), 5 Wright and Miller, Federal Practice and Procedure: § 1347 at 533 (1969).

Merely the denials of the paragraphs in Respondents' complaints seeking punitive damages did not preserve any right to a defense based on constitutional principles. Respondents respectfully submit that this Court should not allow Petitioner to make a constitutional contention out of a nonconstitutional denial. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n. 23 (1989). A nonspecific denial does not provide notice to the plaintiff of defendant's precise claims and does not "promote the expeditious and simultaneous presentation of defenses and objections" in the manner intended by the rules of pleading. 5A Wright and Miller, Federal Practice and Procedures: § 1346 at 532 (1969).

Further, a Motion for JNOV is only a renewal of the motion for a directed verdict; therefore, a party cannot assert in it a new theory which was not raised in the directed verdict motion. *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980), *Sulmeyer v. Coca Cola Company*, 515 F.2d 835, 846 (5th Cir. 1975), 9 Wright and Miller, Federal Practice and Procedure: § 2537 at 598 (1971).

Petitioner's failure to object at trial to the charge concerning punitive damages should likewise bar it from raising these issues in this Court. Objection to a jury charge must be made at trial or the objection is waived. Fed.R.Civ.P. 51, *Havee v. Belk*, 775 F.2d 1209, 1120 (4th Cir. 1985), *Jarrell v. Ford Motor Co.*, 327 F.2d 233, 236 (4th Cir. 1964). A party must "state distinctly the matter to which he objects and the grounds of his objection", Fed.R.Civ.P. 51, so as "to bring into focus the precise nature of the alleged error". *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943).

Petitioner's failure to provide any timely notice to the Respondents or to the District Court of its objection to the submission of punitive damages to the jury on constitutional grounds precluded both Respondents and the Court from any development of the record in that regard. Petitioner should not now be allowed to benefit from its failure to raise the issue by claiming error in the failure of the Court to provide that which Petitioner did not seek.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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